STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID AARON GOODWILL,

Defendant-Appellant.

UNPUBLISHED
April 10, 2008

No. 275244
Montmorency Circuit Court
LC No. 06-001399-FC

Before: Zahra., P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), for which he received a mandatory sentence of life in prison. The case stems from the stabbing death of Jason Fontenot. Defendant argued at trial that he had acted in self-defense. We affirm.

Most of defendant's claims of error involve evidentiary matters. We review preserved challenges to the admission or exclusion of evidence by a trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Defendant's unpreserved claims are reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. Questions of law are reviewed de novo." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007) (internal quotations and citation omitted).

I

Defendant first argues that the trial court erred by refusing to allow Elizabeth Parish to testify and by refusing to permit cross-examination of Detective Kevin Day regarding Parish. On the third day of trial, during the prosecution's presentation of proofs, the trial court took testimony from Parish outside the presence of the jury. After hearing what she had to say, the court determined that the testimony was of questionable value to either side, and excluded it as being more prejudicial than probative. Defense counsel did not object to the exclusion of her testimony. Later in the day, defendant's audiotaped interrogation by the police was played for

the jury. During the interrogation, several references were made to a woman named "Liz." There is no dispute that these were references to Parish. Defendant argues that these references to Parish advanced a possible motive for the killing, i.e., that Fontenot was a rival with defendant for Parish's affections. After Detective Day testified regarding his investigation and interview of defendant, defense counsel indicated that he wanted to call Parish as a defense witness. The trial court denied the request and told both sides that they were not to mention the name in closing arguments. The court also instructed the jury that it had deemed testimony by "Liz" to be irrelevant, and they were not to consider it in any way during their deliberations.

Although defense counsel had multiple opportunities to request that portions of defendant's taped statement be omitted, he never requested the omission of any of the "Liz" references. Defendant cannot claim that the court erred in not allowing him to pursue a line of questioning about a subject that the court had ruled, without objection by defendant, was irrelevant and inadmissible. We also note that it was defense counsel who brought up the subject of motive in his opening statement and attempted to ask Detective Day whether defendant and Fontenot's alleged rivalry over Parish was considered a motive for the killing. At no time did the prosecution ever mention Parish, question anyone about Parish, or argue that the alleged rivalry was a motive for the killing. In other words, the issue of Parish as a motive was injected into the trial by defendant. If any prejudice inured to defendant, it was the result of his own actions. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Moreover, the jury is presumed to have followed the judge's instruction that any testimony by Parish had been ruled irrelevant and that the jury should decide the case based only on relevant, admissible evidence. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

As for defendant's assertion that the exclusion of Parish denied him the opportunity to defend against a theory of guilt advanced by the prosecution, we again note that the prosecution never argued at trial that Parish was a motive for the killing. Moreover, the absence of Parish's testimony did not destroy defendant's ability to present his self-defense theory. Further, defendant stated during the police interview that Parish had told him that Fontenot was bugging her but that he did not think anything about it. Accordingly, the testimony was properly excluded as irrelevant because it did not have the tendency to make any fact of consequence more or less probable. MRE 401. Therefore, the trial court did not abuse its discretion in denying the admission of Parish's testimony. *Maldonado*, *supra* at 388.

II

Defendant next claims that the trial court erred by admitting into evidence a knife and a rock, and by failing to strike testimony that finding the knife was "an act of God." Defendant argues that the prosecution failed to connect the knife and the rock to the charged offense. We disagree. *People v O'Brien*, 113 Mich App 183, 204; 317 NW2d 570 (1982) observes that "[t]o lay a proper foundation for the admission of real evidence, the article must be identified as what it is purported to be and shown to be connected with the crime or with the accused, although such identification is not required to be absolute or certain." Identification of the item need not be absolute, positive, certain, or wholly unqualified to justify admission. MRE 901; see also *People v Hence*, 110 Mich App 154, 161; 312 NW2d 191 (1981), quoting *People v Burrell*, 21 Mich App 451, 456-457; 175 NW2d 513 (1970). If there is "some evidence" presented to

establish that foundation, a defendant's objection to its admission is properly directed to the weight of the evidence rather than to its admissibility. *Id.*

The pathologist who examined Fontenot testified that the wounds inflicted were consistent with a single-edged knife. The knife that was admitted was a single-edged knife that tested positive for the presence of human blood. It was located in the area where defendant stated the killing occurred, near where the police had been searching. It is not an abuse of discretion for a trial court to admit a weapon similar to the one used in the crime and that may have been the weapon used. *People v Kramer*, 103 Mich App 747, 758-759; 303 NW2d 880 (1981). It was up to the jury to determine how much weight to give to the knife. Additionally, admission of the weapon was not necessary to place defendant at the scene of the crime or to prove his involvement, as his claim was that of self-defense, and neither the existence of the knife nor the location where it was found was inconsistent with defendant's claim of self-defense. Moreover, even if it was error to admit the weapon, it was likely harmless because the other evidence against defendant was overwhelming. *People v Burnett*, 166 Mich App 741, 752; 421 NW2d 278 (1988).

As for the rock, it was connected to the crime simply because the knife was found resting upon it. *O'Brien, supra* at 204. Thus, the limited role of the rock is clear, and it is unlikely that it in some way confused or misled the jury. Moreover, because the blood found on the rock was determined not to be human, the rock was actually admissible under MRE 401 as tending to make it less probable that the knife was the murder weapon (an argument made by defense counsel during closing arguments). Therefore, the admission of the rock does not appear to be outside the range of principled outcomes. *Maldonado, supra* at 388.

Defendant also claims that Deputy Sheriff Jeffrey Shaw's nonresponsive comment that finding the knife was "an act of God" constituted improper bolstering and the trial court's refusal to strike the testimony was error. We note that defense counsel did not raise a contemporaneous objection to the testimony, but rather, moved to strike the testimony the following day. The trial court indicated that some jurors might actually hold the statement against Deputy Sheriff Shaw and that "[t]rying to explain something like that can do nothing but confuse the issues." The trial court opined that the testimony went to whether the knife was found by accident or on purpose, and the court did not see what difference that made. The context of the testimony supports the court's characterization. Further, defendant's reliance on MRE 610 is misplaced. It is clear that defense counsel was not attempting to inquire about the witness's religious beliefs in order to show that the witness was more or less truthful. Indeed, it is the nature of a nonresponsive answer that the witness has branched into an area not addressed in the questioning. Consequently, it does not appear that the trial court committed plain error in denying defendant's belated request to strike the testimony. *Carines, supra* at 774.

III

Defendant next argues that certain testimony that was admitted constituted improper opinion as to defendant's guilt. It is improper for a witness to "express an opinion on the defendant's guilt or innocence of the charged offense." *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). However, we do not find that any of the challenged testimony

constitutes an expression of defendant's guilt.

The forensic pathologist's testimony that the wounds on defendant's hands were more likely offensive than defensive was proper. There was no objection to the pathologist's expert status, and he based this testimony on his experience and knowledge. Such testimony was helpful to the jury in deciding a material issue. MRE 702; *People* v *Beckley*, 434 Mich 691, 710-711; 456 NW2d 391 (1990). Moreover, the pathologist did not unequivocally state that they were offensive wounds, indicating that he could not exclude the possibility that the wounds were defensive. Therefore, whether the wounds were in fact defensive or offensive was left for the jury to decide by weighing the evidence and assessing the credibility of the witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Therefore, admission of this testimony was not an abuse of discretion. *Maldonado, supra* at 388.

The challenged testimony by Detective Day was also permissible. On direct examination, the following exchange between the prosecutor and the detective took place:

> *Q.* There is a portion in the tape where you say to [defendant], "this doesn't look like self defense." Did you show him anything at that time?
>
> *A.* At that point in the interview I had showed [sic] him a picture of [Fontenot] and asked him, "Does this look like self defense to you?" And he said no.

The question asked of the detective had nothing to do with his opinion as to defendant's guilt. It referenced a statement made by defendant during the taped interview in which defendant was asked his opinion about self-defense. At no time did the detective say that it did not look like self-defense to him, or that he thought defendant was guilty. Because nothing about the exchange involved the detective's opinion as to defendant's guilt, the trial court properly allowed the testimony.

We also see no merit in defendant's assertion that other portions of the taped interview improperly touched on the ultimate issue of defendant's guilt. Defendant cites questioning posed by the interrogating officer in which the officer stated that the police were skeptical about the truth of defendant's story. As noted above, defendant had multiple opportunities to object to portions of the recorded interview, but at no time did he object to the sections now complained of on appeal. Further, an interrogating officer's expression of doubt about the truthfulness of a defendant's story does not improperly impose on the province of the jury to decide the issue of guilt or innocence. MRE 701; *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988). Even assuming that there was error, defendant has not shown any prejudice from the admission of the testimony, let alone that he was actually innocent or that the integrity of the proceedings was damaged, so reversal is not required. *Carines*, *supra* at 763.

IV

Defendant's final claim on appeal is that he was denied a fair trial from several instances of prosecutorial misconduct. These forfeited claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d

501 (2003). "Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994) (internal citation omitted). Only if "plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings" is reversal warranted. *Callon, supra* at 329.

Defendant first claims that the prosecutor improperly appealed to the jury's sympathy in her opening and closing arguments. A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). We conclude that while the statements were close to the line, given their limited nature and taken in the context of the arguments made they were not so inflammatory as to prejudice defendant. *Id.* at 591-592, citing *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999).

Defendant next complains about character evidence admitted regarding Fontenot's reputation for peacefulness. Because defendant raised the issue of self-defense, he placed the victim's reputation for peacefulness at issue. MRE 404(a)(2) (observing that "evidence of a character trait of peacefulness of the alleged victim" is permissible). MRE 405(a) sets the parameters under which character evidence may be admitted, specifically stating that, "proof may be made by testimony as to reputation or by testimony in the form of an opinion." It appears from the record that there is no error because all of the evidence was properly admitted for two of the witnesses and properly excluded as to the third because the witness indicated that she did not know of Fontenot's reputation for peacefulness in the community.

Defendant also claims error in the prosecution's misstatement of testimony during closing arguments. The prosecutor stated, "[a]nd before [defendant] got in the car or—excuse me—in the truck, he said to his friend, Ken, 'I'm going to kill him. He crossed me and I'm going to kill him.'" In fact, the testimony was that defendant told his friend, "I'm going to kill him," to which the friend responded by asking how Fontenot had crossed defendant. However, defense counsel also misstated the testimony in his closing arguments: "Do you really think it was a situation where he said, 'I'm going to kill this guy, he crossed me,' as he leaves?" Because defense counsel also quoted the misstated testimony in his closing argument, he may not claim error on appeal. *Griffin, supra* at 46. Moreover, the trial court properly instructed the jurors that it was their responsibility to "decide the facts of this case," that the closing statements of counsel were not evidence, and that they "should only accept things the attorneys say that are supported by the evidence." Jurors are presumed to follow their instructions. *Graves, supra* at 486. Accordingly, there is no plain error in this forfeited claim. *Callon, supra* at 329.

Lastly, defendant claims his rights were violated when the prosecutor made inferences to defendant's refusal to testify. Specifically, defendant objects to the prosecutor's statement that if defendant were innocent, he would have notified the police and that when the police arrested him, he would have shouted, "I was attacked and I acted in self defense." Defendant also complains about various other statements that he believes are related to his choice not to testify. Defense counsel's motion for a mistrial on this issue was denied. "The denial of a motion for a mistrial is reviewed for an abuse of discretion." *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "'A mistrial should be granted only for an irregularity that is prejudicial to

the rights of the defendant . . . and impairs his ability to get a fair trial.'" *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (omission by *Alter*).

"Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A review of the comments in context confirms the prosecutor's assertion that her references related to defendant's statement to the police and not to defendant's choice not to testify. As for the references to defendant not calling the police, the prosecutor's arguments related to defendant's failure to claim self-defense initially and then later claim it during the police interview. A defendant's pre-arrest silence may not be used as substantive evidence of his guilt, but it may be used to impeach him. *People v Patterson*, 170 Mich App 162, 171-172; 427 NW2d 601 (1988). In the case at bar, the prosecution was using defendant's pre-arrest choice not to tell the police a story consistent with self-defense to impeach his testimony in the taped interview that it was self-defense. *Id*. at 172. Thus, the argument properly drew inferences from the evidence and in no way made reference to defendant's choice not to testify. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (stating that prosecutors are free to argue the evidence and reasonable inferences arising therefrom as it relates to their theory of the case). Evaluating the prosecutor's comments under the *Schutte* standard, the trial court's decision not to grant a mistrial was not an abuse of discretion, *Alter*, *supra* at 205, and defendant was not denied a fair trial, *Legrone, supra* at 82-83.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering